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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1058

J. C. FAIRLEY, ET AL., APPELLANTS

v.

JOE T. PATTERSON, ET AL.

No. 1059

CHARLES E. BUNTON, ET AL., APPELLANTS

v.

JOE T. PATTERSON, ET AL.

No. 1174

CLIFTON WHITLEY, ET AL., APPELLANTS

v.

JOHN BELL WILLIAMS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's orders of March 11 and April 8, 1968, inviting the Solicitor General to state the views of the United States regarding these three cases.

STATEMENT

Pursuant to Section 4(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973b(b)), the Attorney General and the Director of the Census determined on August 6, 1965, that the provisions of Section 4(a) of the Act (42 U.S.C. 1973b(a)) should be applicable to Mississippi, six other States and certain additional counties (30 Fed. Reg. 9897). As a result of this determination, the State of Mississippi was (and continues to be) prohibited under Section 5 of the Act (42 U.S.C. 1973c) from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting such change to the Attorney General of the United States and obtaining his consent or securing a favorable declaratory judgment from the United States District Court for the District of Columbia.

In late spring of 1966, the Mississippi legislature enacted the three statutes which are here at issue:

Fairley v. *Patterson,* No. 1058, involves an amendment to Section 2870 of the Mississippi Code of 1942 which, in effect, gives each county in the State an option to change from district to at-large voting for members of the county's board of supervisors (J.S. 38–43). Prior to the amendment, all counties were required by law to be divided into five districts with the registered voters in each district electing one member to the board. Subsequent to the amendment, Adams and Forrest Counties, following the procedures outlined in the new legislation, chose a system whereby

all candidates must run at large, but "each candidate shall be a resident of the district which he proposes to represent."

Bunton v. *Patterson,* No. 1059, concerns an amendment to Section 6271–08 of the Mississippi Code, which directs that in 11 designated Mississippi counties the office of county superintendent of education should be appointive rather than elective (J. S. 34–41). Prior to the amendment, all the counties involved had the option of electing or appointing that officer. The amendment requires the board of education in each of the counties to appoint an individual to hold that office for a term of not more than four years.

Whitley v. *Williams,* No. 1174, deals with an amendment to Section 3260 of the Mississippi Code, which alters the requirements governing independent candidacies in general elections in Mississippi in four major respects (J.S. 9a–12a). First, it establishes a new rule that no person who has voted in a primary election may run as an independent candidate in the general election;[1] second, it requires independent candidates to qualify to run in the general election at the same time as candidates must qualify to run in the primary election;[2] third, it increases tenfold the number of signatures of qualified electors which must be

[1] Compare *Bowen* v. *Williams*, 238 Miss. 57, in which the Supreme Court of Mississippi construed Section 3260, prior to its amendment, as not prohibiting a person who voted in a primary election from running as an independent candidate in a general election.

[2] Previously, independent candidates had until 40 days before the general election to qualify. They must now qualify 60 days before the primary election. See Section 3118, Mississippi Code of 1942.

included on the nominating petition of an independent candidate; finally, the statute adds the new requirement that each elector shall personally sign the nominating petition and state his polling precinct and county.

There is no dispute that Mississippi enacted and enforced each of these amendments without first submitting these changes to the Attorney General or instituting an action in the District of Columbia court (*e.g.*, J.S. No. 1174, 6a).

Appellants in Nos. 1058 and 1059 represent both the class of persons who wish to run for the offices involved and the class of persons who are eligible vote for such candidates. Appellants in No. 1174 are potential candidates whose nominating petitions for independent listing on the ballot were rejected (J.S. 6–7).[3] The complaints filed by appellants in all three cases requested the impanelment of three-judge district courts under 28 U.S.C. 2281 and Section 5 of the

[3] When the complaint in No. 1174 was first brought, plaintiffs were prospective independent candidates for State offices whose nominating petitions were rejected because they contained insufficient signatures to qualify for a place on the ballot under the amendment to Section 3260. Without reaching the merits, the three-judge court ordered plaintiffs' names placed on the ballot for the 1966 election. *Whitley* v. *Johnson*, 260 F. Supp. 630 (S.D. Miss.). Thereafter, other members of the class of plaintiffs were denied a place on the 1967 ballot for non-compliance with all of the changes made in Section 3260 (J.S. 6–7, 6a–7a). The decision now before this Court grew out of the plaintiffs' attempts to have the three-judge court take action to place the latter group of candidates on the ballot. In regard to the specific laws involved in No. 1174, see Report of the U.S. Commission on Civil Rights, *Political Participation* (hereinafter *Civil Rights Commission Report*), pp. 44–47 (May 1968).

Voting Rights Act of 1965. They alleged, *inter alia*, a violation of the Fifteenth Amendment and of the Voting Rights Act, and requested declaratory judgments invalidating the statutes at issue. In each of the cases it was stipulated prior to the hearing that the only issue before the court was whether or not the statute involved was covered by Section 5 of the Voting Rights Act (J.S. No. 1058, 33, 35–36; J.S. No. 1059, 27–28, 30, 32; J.S. No. 1174, 1a, 7a). In all three cases the three-judge courts which were convened held that the Mississippi legislation "does not come within the purview of and is not covered by" Section 5, and dismissed the complaints (J.S. No. 1058, 33, 36; J.S. No. 1059, 28, 30, 32; J.S. No. 1174, 4a).

DISCUSSION

I

The threshold question in these cases is whether three-judge courts were properly convened so that direct appeals lie to this Court. We note that, until the matter was noticed here in the order requesting the views of the Solicitor General in Nos. 1058 and 1059,[4] no one appears to have doubted the appropriateness of convening a court of three judges. In each case, the plaintiffs requested a three-judge court, the district judge to whom the matter was assigned certified the necessity for convening such a court, and the chief judge of the circuit appointed additional judges.

[4] Although the order in No. 1174 makes no reference to a possible jurisdictional problem, our submission on this point applies to that case also, since, in our view, all three cases are in the identical posture.

At no time did the defendants oppose the convening of a three-judge court and, as appellees here, they do not now suggest any jurisdictional defect.[5] While these facts do not, of course, preclude the issue, they suggest a cautious approach.

In light of the decision in *Swift & Co.* v. *Wickham*, 382 U.S. 111, it seems clear that 28 U.S.C. 2281 did not require the convening of three-judge courts in these cases, which presented only a claim that State statutes must yield, under the Supremacy Clause, to the mandate of the federal Voting Rights Act.[6] See *County Board of Election of Monroe County, New York, et al.* v. *United States*, 383 U.S. 575. The question remains, however, whether Section 5 of the Voting Rights Act itself called for the convening of three-judge courts. That provision reads as follows:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on Novem-

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[5] In each case, appellees have alternatively moved for dismissal of the appeal, but solely on the ground that "no substantial question on the merits has been raised or presented" (No. 1058, Motion 23; No. 1059, Motion 15; No. 1174, Motion 14). This is, of course, a basis for summary affirmance, but not for dismissal in a federal case. See Rule 16(c) of the Rules of this Court.

[6] While direct constitutional challenges to the State statutes, grounded on the Fifteenth Amendment, were originally coupled with claims under Section 5 of the Voting Rights Act, those challenges were, in each case, eliminated by stipulation before hearing and decision.

ber 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Plainly, there is here a mandate for convening a three-judge court to entertain the declaratory action in the District Court for the District of Columbia which a covered State or political subdivision is authorized to initiate by the first sentence of the section.

The present suits, of course, are not of that kind. Yet, they, too, may qualify as "action[s] under this section." The matter is not free from difficulty, but we believe that there is support for the affirmative answer tacitly given by the several judges below.

At the outset, we note that the provision requiring the convening of a three-judge court—at the end of Section 5—is separated from the opening sentence of the section which authorizes actions by State authorities in the District of Columbia court. Although other explanations are possible, a permissible inference is that the last sentence of Section 5 covers more ground.

So also, while the phrase "[a]ny action *under* this section" can be read narrowly as directed only to suits expressly authorized by the section, the more usual meaning of those words would include any suit resting on, or invoking, the provision. That is the usage followed in the Judicial Code with respect to general federal question jurisdiction (28 U.S.C. 1331(a)), and also with respect to jurisdiction of suits "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote" (28 U.S.C. 1343(4))—the very provision invoked by the present appellants.[7] It is worth noting that other provisions of the Voting Rights Act, which plainly

[7] Although the Voting Rights Act itself does not expressly provide for private suits to enforce Section 5, there is, in our view, no question that such proceedings are proper. Section 5 explicitly confers upon individual citizens a right not to be "denied the right to vote for failure to comply with [any new] qualification, prerequisite, standard, practice or procedure" until the new requirement has been approved by the Attorney Gen-

govern only the type of action there specified, use a more restrictive formulation—"such action" (Section 10(c), 42 U.S.C. 1973h(c)), "an action pursuant to this subsection" (Section 4(a), 42 U.S.C. 1973b(a)), "proceedings instituted pursuant to this section" (Section 12(f), 42 U.S.C. 1973j(f)), or "any declaratory judgment pursuant to section 1973b or 1973c" (Section 14(b), 42 U.S.C. 1973*l*(b)).

Finally, it is not inconsistent with the policy of the three-judge court requirement of Section 5 for such a court to be impaneled in these cases. We recognize that

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eral or found innocuous by the District Court for the District of Columbia. Jurisdiction of a suit to vindicate that right would seem to be conferred on the district courts by 28 U.S.C. 1343(4). The special authorization for a similar action by the Attorney General in Section 12(d), (f) (42 U.S.C. 1973j(d), (f)), is, of course, no indication to the contrary; that provision merely confers standing on the Attorney General, who might otherwise not be deemed empowered to vindicate private rights. See *United States* v. *Raines*, 362 U.S. 17, 27.

Nor is there any doubt that these suits were properly instituted in the Southern District of Mississippi, rather than the District of Columbia. The stipulation in Section 14(b) of the Act (42 U.S.C. 1973*l*(b)), denying jurisdiction to district courts other than the District of Columbia court, applies only to the issuance of injunctions "*against* the execution or enforcement of any provision of [the Act]" (*e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 645–646) and to "any declaratory judgment *pursuant to* section 1973b or 1973c of this title [Sections 4 and 5 of the Act]," plainly refers to suits instituted by States or subdivisions. Proceedings to *enforce* compliance with Sections 4 and 5 are not covered. That is made clear in Section 12(f) (42 U.S.C. 1973j(f)) which generally confers on the "district courts of the United States" jurisdiction to entertain injunctive actions by the Attorney General authorized by Section 12(d), which, *inter alia*, includes suits to vindicate Sections 4 and 5. See *United States* v. *County Board of Election of Monroe County, New York, et al.*, 248 Supp. 316 (W.D. N.Y.), appeal dismissed, 383 U.S. 575. The limitation of Section 14(b) is no more applicable to comparable private suits.

the convening of a three-judge court "makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions" (*Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 92 (dissenting opinion)), and that it is therefore appropriate to read any three-judge provision "as an enactment technical in the strict sense of the term and to be applied as such" (*Phillips* v. *United States*, 312 U.S. 246, 251). There are, moreover, delays inherent in the convening procedure which may, on occasion, present problems—even though a single district judge has authority under 28 U.S.C. 2284(3) to grant temporary relief where delay would cause irreparable harm. Yet, Congress obviously concluded that when the governing authorities of a State differ with the Attorney General of the United States over the effect of a change in voting procedures or standards, it is inappropriate to have that difference resolved by a single district judge. Similar considerations may well suggest a court of three judges when the claim being made by a private party is that a State statute of general applicability should be enjoined because the State has not followed the procedures prescribed by federal law to determine whether the statute's purpose or effect is to deny or abridge "the right to vote on account of race or color," contrary to the Fifteenth Amendment. The court is asked to determine whether the State must institute a three-judge court action before it may implement its statute, and, if so, effectively to enjoin the operation of the State law for what may be a substantial period. In the circumstances, it may well have been thought important to avoid "the worrisome

possibilities that economic or political predilections [would] find their way into a judgment" and to insure "greater restraint and dignity at the district court level" by requiring three judges to hear such challenges (*Swift & Co.* v. *Wickham*, 382 U.S. at 127). Under this analysis, the three-judge courts were properly convened here, and the appeals to this Court are proper under 28 U.S.C. 1253 and Section 5 itself.

II

Assuming this Court's jurisdiction on direct appeal, and turning to the merits, it is our position that the courts below in each of these cases erred in concluding that the Mississippi statutes in question are not covered by Section 5 of the Voting Rights Act (42 U.S.C. 1973c). Our submission, of course, does not reach the ultimate issue of the validity of the challenged State laws; the only effect of judgments reversing the district courts would be to stay the implementation of the new statutes until that question is resolved by the District Court for the District of Columbia if the Attorney General, upon investigation, should determine to interpose objections.

We ground our conclusion regarding the applicability of Section 5 both on the literal language and on the legislative history and background of that provision. Section 5 broadly covers "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" in any State or political subdivision subject to the prohibitions of Section 4(a) of the Act (42 U.S.C. 1973b(a)). It was stipulated in the courts below that Mississippi is a covered State. Section 5 contemplates that such a "qual-

ification, prerequisite, standard, practice, or procedure" will be allowed to go into effect only after a determination, by the District of Columbia court or the Attorney General, that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 14(c)(1) of the Act (42 U.S.C. 1973*l*(c)(1)), moreover, defines the term "voting" in sweeping fashion to include "all action necessary to make a vote effective in any primary, special, or general election." Our position, simply stated, is that the three statutes involved in the instant cases all prescribe practices or procedures which may result in abridging the right of Negro citizens to vote by rendering ineffective their exercise of the franchise so recently achieved. Accordingly, the statutes are plainly within the congressional contemplation in enacting Section 5.

We recognize, of course, that the instant cases do not involve statutory changes which, in so many words, alter the existing rules governing the casting of individual ballots. Indeed, appellees' central theme in these cases is that Section 5 is inapplicable because the statutes involved relate only to methods to be utilized in selecting candidates or officeholders, and not in terms to qualifications for individual voters.[8]

[8] Similarly, in the legislative apportionment cases decided by this Court in recent years, individuals had the right to vote, albeit the right of some was impaired through districting arrangements which accorded greater weight to the votes of others. That, indeed, was the crux of the disagreement between the majority and the dissenters in those cases. There, of course, the Court found that the right to vote involved more than the act of casting a ballot, and that the Equal Protection Clause required an equally weighted and effective vote for all citizens.

But the congressional purpose underlying Section 5 was not so narrowly circumscribed, and the significance of the broad statutory language cannot be so easily dismissed. Here it seems clear that the statutes involved affect the electoral process in Mississippi in a direct and significant way, for the challenged laws substantially change the constituency of certain elected officials, wholly remove certain offices from the electoral process, and restrict the availability of certain persons as candidates for public office.

There is surely no doubt today that the right to vote can be curtailed as effectively by an impermissible demarcation of an elected official's constituency as by the destruction of ballots or the refusal to permit access to the voting booth. This Court firmly established that principle in *Gray* v. *Sanders*, 372 U.S. 368, and *Wesberry* v. *Sanders*, 376 U.S. 1, and confirmed it in *Reynolds* v. *Sims*, 377 U.S. 533, 555, stating:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[9]

By a parity of reasoning, if a State otherwise subject to the strictures of the Voting Rights Act can

[9] As Mr. Justice Fortas stated in his dissenting opinion in *Fortson* v. *Morris*, 385 U.S. 231, 250: "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected."

dilute and impair the right to vote by resort to various devices which render the votes cast by newly enfranchised Negroes ineffective, then the bright promise of that enactment for "millions of non-white Americans" might never be realized (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 337).

In explaining the congressional purpose in enacting Section 5, this Court stated in that case (*id.* at 335):

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

At an earlier point, the Court noted that "Section 5 prescribes * * * the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination" (*id.* at 315–316). Thus, the language of Section 5 and this Court's references to that provision in its opinion in *South Carolina* v. *Katzenbach* strongly support the view that the section should not be read grudgingly. And this approach is confirmed by the legislative history of Section 5, which plainly indicates that Congress intended it as a broad prophylactic measure, not the narrow and wholly ancillary provision which appellees suggest.

Section 5 was designed to keep the right to vote

free from all potential forms of frustration and impairment by States which had previously pursued a policy of disenfranchising Negroes. Rather than attempting to spell out which kinds of procedures and practices were intended to be covered,[10] Congress spoke in general terms, leaving it to the District of Columbia court or the Attorney General to make the determination as to which side of the line a particular procedure or practice fell. The initial burden would be placed on the State or political subdivision desiring to make a change in a law relating to voting to seek judicial or executive approval. Since Section 5's approval procedure was designed to serve an informing function—to provide "a method of bringing to the attention of the Government changes in State law" (Assistant Attorney General Marshall, *House Hearings,* p. 72), an added impetus to construe its coverage broadly is provided. Indeed, since the Voting Rights Act as a whole was intended to make effective the protections of the Fifteenth Amendment, its reach is no less. Like that amendment, the statute was obviously designed to embrace any effort to establish "sophisticated as well as simple-minded modes of discrimination" (*Lane* v. *Wilson,* 307 U.S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342). It is in

[10] Because of the numerous and various changes in voting laws which were potentially reached by Section 5, it was understood, as pointed out by Attorney General Katzenbach, that the intended scope of the section would be "very difficult to express * * * in precise terms without knowing in what State and under what circumstances and conditions" particular changes were made (Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter *House Hearings*), p. 62).

this context, we submit, that the legislative history of Section 5 should be viewed.

The policy behind Section 5 was explained by the then Attorney General in his testimony before the House Committee (*House Hearings,* p. 60):

> Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. * * *
>
> * * * * *
>
> If you look at the past history on this, it seemed to us that the State which had been discriminating in the past should be subjected to some kind of limitations as to any new legislation that it may propose. * * *

During the same House hearings, the Chairman of the House Judiciary Committee described the Section as "all sweeping" (*ibid.*). Similarly, during the Senate hearings Senator Fong inquired whether it would be possible to broaden the proposed bill's language to make it cover changes which might not be encompassed by the word "procedures". The Attorney General replied that he thought that the language then being used was "all-inclusive of any type of practice," but that he would accept a change adding the words "standards" and "practices" to Section 5 (Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pp. 191–192).

During the course of the congressional hearings and debates a variety of examples of changes poten-

tially covered by Section 5 were suggested. Mentioned were changes in the date of an election (remarks of Senator Talmadge, 111 Cong. Rec. 10571); changes in the voting age, residence requirements or property requirements; changes in the frequency and duration that registrars' offices are open; and changes from paper ballots to machines, or vice versa (Attorney General Katzenbach, *House Hearings,* pp. 60–62); and establishment of new voting precincts (H. Rep. No. 439, 89th Cong., 1st Sess., views of Representative Tuck, p. 75). Opponents of the Act attributed a broad scope to the language of Section 5. On the floor of the Senate, Senator Talmadge observed that the provision would prevent a State from enacting legislation which affected State and local elections "in any manner whatsoever" (111 Cong. Rec. 10725).[11] Similarly, proponents of the legislation viewed Section 5 expansively. Senator Hart explained that the provision was designed to end the lengthy "fencing match" provoked by "each thrust of national power designed to protect Negro rights" (111 Cong. Rec. 8303). Congress' objective was, as Senator Tydings noted, to "put an end to this game of cat and mouse which the State legislatures have played for so long" (111 Cong. Rec. 10727). And it is clear that the provision was enacted with full recognition of the warning given by the Attorney General that "there are an awful lot of things that could be started for purposes of evading

[11] See also the further remarks of Senator Talmadge (111 Cong. Rec .10571–10572), and the remarks of Senator Ervin (111 Cong. Rec. 10726).

the 15th amendment * * *" (*House Hearings,* p. 95). In short, both the proponents and opponents of the statute believed that Section 5 was designed to encompass all types of changes which might have a significant effect on the free and effective exercise of the right to vote.

Apart from the legislative history, the limited judicial consideration heretofore given Section 5 supports a broad view of its scope. Indeed, the provision has been accorded a generous interpretation in several opinions in the two cases in which the section was involved. In *Sellers* v. *Trussell,* 253 F. Supp. 915 (M.D. Ala.), an Alabama statute changing the term of office of county commissioners in Bullock County from four to six years was challenged on Section 5 grounds. Circuit Judge Rives was of the view that the measure was suspended by Section 5 because the legislative history showed the provision to be a broadening one which is "all-inclusive of any kind of practice" (253 F. Supp. at 918). Accordingly, Judge Rives concluded that "[p]ostponing an election by extending the terms of office" constituted a change covered by Section 5, since the statute "embodies a practice or procedure respecting voting," although not in terms relating to voter qualifications (*ibid.*).[12] *In South Carolina* v. *Katzenbach,* 383 U.S. 301, as noted

[12] Judge Johnson found it unnecessary to consider the question of the applicability of Section 5, concluding that the statute was unconstitutional on Fifteenth Amendment grounds, and Judge Grooms dissented as to this part of Judge Rives' opinion (see 253 F. Supp. at 918–919).

previously (*supra*, p. 14), this Court, while not attempting to delineate the scope of Section 5, referred to that provision as broadly "suspend[ing] new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment" (383 U.S. at 334). More particularly, Mr. Justice Black, who dissented on the issue of the constitutionality of Section 5, stated that under that provision an affected State "can in no way amend its constitution or laws relating to voting without" following the procedures prescribed by the section (383 U.S. at 356). Thus, the only judicial authority regarding the reach of Section 5—apart from the decisions below in the instant cases—supports a broad reading of that section's language.

Appellees raise a series of objections to the applicability of Section 5 to the changes in laws relating to voting involved in the instant cases. They assert that the language of the section indicates that it was intended to relate only to changes directly affecting the casting of individual ballots. As we have shown, however (*supra*, pp. 11–12), Section 5 broadly includes not only "any voting qualification or prerequisite," but also any "standard, practice, or procedure with respect to voting." If appellees' reading of the statutory language is correct, that latter phrase would seem wholly redundant; obviously it should be accorded some meaning and effect.[13] Appellees also point out that Section 5 provides that "no person

[13] Moreover, as noted earlier (*supra*, p. 12), Section 14(c)(1) of the Act defines "voting" as including "all action necessary to make a vote effective in any * * * election, including, but

shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." They focus on the word "comply" and argue that only changes in laws relating to voter qualifications are susceptible of compliance by a voter. But that is hardly dispositive. The choice of the term "comply with" was obviously suggested by the fact that the provision would reach laws relating to qualifications that were not already condemned as tests or devices. It does not follow that the scope of Section 5 should be cut down because a single phrase was selected which is somewhat inapt with respect to other matters also intended to be covered.

Appellees claim to find supoprt in the legislative history for their view that Section 5 is of limited scope. Apart from a single comment by then Assistant Attorney General Marshall, however, the congressional hearings and debates point the other way. The remark of the Assistant Attorney General occurred during the House hearings, and was to the effect that "[t]he problem that the bill was aimed at was the problem of registration" (*House Hearings,* p. 74). The comment was given in response to a question from Representative Corman regarding "whether or not the bill ought to address itself to the qualifications for running for public office as well as the problem of registration" (*ibid.*). In the first instance, it is hazard-

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not limited to * * * casting a ballot, and having such ballot counted" (42 U.S.C. 1973*l*(c)(1)). And Section 5 itself speaks not only of "denying" the right to vote on account of race or color, but also, in parallel terms, of "abridging" that right.

ous to attempt to accord controlling significance to a single comment by one individual regarding the intended scope of a statutory provision, particularly where, as here, the voluminous hearings and debates contain no other similar remarks. Moreover, considering the context in which the statement was made, it appears rather ambiguous. It is not clear that Representative Corman was discussing Section 5 at all in asking the question, and it is conceivable that the Assistant Attorney General's attention was accordingly not focused on that provision when he gave his answer. Similarly, the phrase "qualifications for running for public office" is hardly a precise one, and conjures up a variety of considerations, some of which may be substantially unrelated to a practice or procedure relating to voting. In short, the Assistant Attorney General's comment, while appearing to look towards ~~respondents'~~ appellees' position, is at least partially explicable by the circumstances in which it was made, and cannot in any event be given decisive weight in the face of the other indications of a broader congressional purpose.

Finally, appellees rely on the fact that in apportionment litigation relating to affected States no mention whatever has been made of Section 5. This resulted, they assert, because no one contemplated that that provision had anything to do with methods for selecting candidates for public office and for choosing officeholders. Perhaps there has been a general unawareness of the potential relevance of Section 5 to apportionment matters. But governmental and judicial silence in this regard in the past should hardly

be held to preclude an assertion by appellants here of their statutory right not to have their right to vote denied or abridged without compliance with the approval procedure prescribed by Section 5. Nor can the Attorney General's failure to act under Section 12 of the Act in cases involving reapportionment and redistricting be properly viewed as undermining these Section 5 cases or refuting the clear congressional intent that that provision should be given broad scope. The most that can be assumed from past silence is that the Attorney General was not prepared to interpose an objection to the changes being effected, and thus declined to seek to compel a State or political subdivision to comply with what would have in all likelihood been a wholly formalistic step that would merely have delayed final implementation of a constitutionally required restructuring of government.

In any event, there is no need here for the Court to reach the question whether Section 5 extends to the typical sort of apportionment litigation and districting changes which have followed in the wake of this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186, *Wesberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, and which will predictably ensue in light of the recent holding in *Avery* v. *Midland County*, No. 39, this Term (decided April 1, 1968). Virtually all changes in apportionment and districting arrangements in the States covered by the Voting Rights Act have been accomplished under the aegis and supervision of federal courts, and not by the States alone. Judicial approval of revised plans has been given or withheld, depending on whether the re-

vised arrangement comports with the requirements of the Equal Protection Clause as delineated in this Court's landmark decisions. All such changes were directed toward achieving fairer representation for all citizens and insuring that all voters, however situated, cast an equally weighted vote. It is thus rather unlikely that any such changes would have a potentially detrimental effect on the right of newly enfranchised Negroes to vote in the affected States; rather, they would in all probability serve to assist in the effectuation of Fifteenth Amendment rights (see *Reynolds* v. *Sims*, 377 U.S. at 568).[14] Moreover, none of the instant cases involve the typical sort of apportionment or districting questions presented in the cases to which respondents make reference. This is so even in No. 1058, which involves a change in Section 2870 of the Mississippi Code to permit the election of members of county boards of supervisors at large rather than from districts, while retaining the previous election districts as residence districts. Some question may of course be raised about the constitutional validity of such a scheme, even in light of this Court's decision in *Dusch* v. *Davis*, 387 U.S. 112, on Fourteenth Amendment grounds. Nonetheless, the case does not fit into the ordinary pattern of apportion-

[14] Where, however, a revised apportionment plan has involved Fifteenth Amendment problems, the federal courts have not been reluctant to perceive such difficulties and to hold such a plan invalid on that ground. *E.g.*, *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala.); cf. *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.); *Gomillion* v. *Lightfoot*, 364 U.S. 339; compare, however, *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss.), affirmed *per curiam*, 386 U.S. 483.

ment and districting litigation, and thus a holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected States relating to apportionment and districting of governmental bodies.

We conclude, then, that the Mississippi statutes involved in these cases are embraced by Section 5. As we have said, the critical question at this juncture is not whether the statutes have the purpose or effect of denying or abridging the right to vote on account of race, but whether they affect voting at all. To us, that seems clear. By changing the law to allow counties in the State to elect boards of supervisors at large rather than by individual districts (No. 1058), Mississippi has plainly affected the voting strength of those who reside in individual districts.[16] By removing the office of county superintendent of education from the roster of elected officials in 11 designated counties, Mississippi has withdrawn an entire area of local govern-

[16] Moreover, resort to this device permits the perpetuation of the previous scheme of unequally populated districts for the election of county supervisors—through use of the residence district technique—and is thus at least questionable in light of this Court's recent decision in *Avery* v. *Midland County*, No. 39, this Term (decided April 1, 1968), which held the equal-population principle of *Reynolds* v. *Sims* applicable to local governmental bodies. Compare, however, *Dusch* v. *Davis*, 387 U.S. 112; but see the extended discussion of that decision in the government's *amicus* brief in *Avery* (pp. 32–40). In light of *Avery*, where the Court made only passing reference to *Dusch*, it at least remains open whether that case states a broad principle applicable in the rather different circumstances presented in No. 1058. In any event, the challenge here is one grounded on the Fifteenth Amendment and the Voting Rights Act which is directed toward the effective implementation of that constitutional provision.

ment from the reach of the elective process.[16] And by prescribing novel conditions for independent candidates for public office in Mississippi, it has restricted the range of choice available to Mississippi voters. In all these respects, the State has attempted to implement "standards", "prerequisites", "practices", or "procedures" affecting voting which differ from those prevailing on November 1, 1964. Section 5 thus applies and requires judicial or executive approval before these changes can be made effective. Such an expansive reading of Section 5, it should be noted, was recently given strong support by the Civil Rights Commission (see *Civil Rights Commission Report*, p. 184).

It remains only to note that compliance with Section 5 in these cases is not an empty ritual performed merely for the sake of conforming to correct procedure. While the determination whether these statutes abridge Fifteenth Amendment rights must await their submission to the proper forum, the prospect of an adverse finding is not fanciful. It is not irrelevant that Mississippi is a State with a history of voter discrimination based on race (see *United States* v. *Mississippi*, 380 U.S. 128), where at the time the Voting Rights Act was enacted only 6.4 percent of the

[16] Nothing in this Court's decision in *Sailors* v. *Board of Education*, 387 U.S. 105, precludes a determination that a change from election to appointment of a local governmental official is without the scope of Section 5. All that the Court there held was that the equal-population principle of *Reynolds* v. *Sims* had no application to the appointment of a school board exercising essentially administrative functions. *Sailors* was solely a Fourteenth Amendment case; the claim here is grounded on the Fifteenth Amendment and the federal statute which seeks to foster its effective implementation. See *Civil Rights Commission Report*, pp. 42–43.

non-white voting age population was registered to vote, by far the lowest figure of any of the affected States (*House Hearings,* p. 32), and that today very substantial numbers of Mississippi Negroes are registered.[17] Against this background, the new laws may well be shown to have a discriminatory purpose or effect. Thus, the statute in No. 1174 makes independent candidacy more difficult, thereby possibly restricting Negro candidacies and limiting the available choices of Negro voters. The statute in No. 1059 might well have the effect of denying to Negro voters, who constitute a majority in 9 of the 11 affected counties, (J.S. 42–45), the option of electing as county superintendent of education a person of their choice. Finally, by authorizing the elimination of district-based voting for county boards of supervisors, the statute in No. 1058 may well insure that the white voters in certain counties will retain full control over all members of the local governing body.[18]

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[17] Recent estimated figures indicate that approximately 235,000 non-white voters have been registered in Mississippi since the enactment of the Act, and that the State now has almost 264,000 non-white voters as compared with only 28,500 prior to passage of the Act. See *Civil Rights Commission Report*, p. 13.

[18] Only in regard to the statute involved in No. 1058 do appellees ~~respondents~~ seek to offer any explanation as to underlying purpose, and their explanation—that the change was necessary to comply with this Court's decisions in reapportionment cases—is a weak and unpersuasive one. It is true that several district court decisions in Mississippi held the equal-population principle of *Reynolds* v. *Sims* applicable to county boards of supervisors (*Damon* v. *Lauderdale County Election Comm'rs* (S.D. Miss.), No. 1197, decided March 30, 1966; *Martinolich* v. *Dean*, 256 F. Supp. 612 (S.D. Miss.)). But not until this Court's recent decision in *Avery* v. *Midland County* was it clear that *Reynolds* applied at the local governmental level. And neither the *Damon* nor *Martinolich* decisions purported to sanction the change adopted; indeed, in the latter case the court expressly

Whether the statutes here involved are ultimately found violative of the Fifteenth Amendment or not, Section 5 will have fulfilled its intended function in the overall pattern of the Voting Rights Act by insuring that careful scrutiny which the Act requires to safeguard the basic right to vote from all possible attempts at evasion or circumvention by the affected States.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted.

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noted that it was not passing on the constitutional validity of the revised scheme authorized by the new Mississippi statute (256 F. Supp. at 616). Moreover, even if some of the impetus for the statutory amendment came from the desire to adjust to this Court's reapportionment holdings, that hardly precludes the possibility of another, less admirable purpose—rendering the votes of newly enfranchised Negroes ineffective in electing supervisors in a county with an overall white voting majority but with Negro voting majorities, at least potentially, in one or more election districts, if equally populated. In short, in no way can the possible presence of the former objective render Section 5 inapplicable, in light of the potential existence of the latter purpose. See *Civil Rights Commission Report*, pp. 22–23.

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